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‘Facultative’ and ‘Functional Mixity’ in light of the Principle of Partial and Imperfect Conferral

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Inge Govaere²

1. Introduction

The concept of ‘facultative mixity’ as first coined by Allan Rosas³ has sparked a much heated debate.⁴ Is it a matter of political expediency in the EU Council to decide on the mixed nature, or not, of a given agreement in so far as it falls within shared competence of the EU and its Member States? Considered as such, this concept is offset against ‘obligatory’ or ‘compulsory mixity’ which would then arise only where the Member States retain an exclusive competence for part of the agreement. It is apparent that the concepts of facultative and obligatory mixity so understood both rest on the premise that the mixed nature of an agreement is to be determined solely on the basis of the division of competence under the EU Treaties. The crucial exercise then lies in the correct appraisal of the ‘partial nature’ of the conferral of competence under the EU Treaties which, of itself, may prove to be a difficult exercise not least in a post-Lisbon setting.⁵

This contribution invokes an extra layer of complexity by introducing the further notion of ‘functional mixity’ which is juxtaposed to facultative and obligatory mixity. Whereas the latter concepts exclusively take an EU introspective approach, functional mixity additionally takes into consideration the international context in which the EU and its Member States necessarily operate when concluding agreements, or adopting decisions in the framework of other international organizations. The indisputable premise is that EU principle of conferral laid down in Article 5 TEU is not only ‘partial’ but also ‘imperfect’ in nature,⁶ possibly leading to a different appraisal under EU and international law. So as to avoid friction or even an open conflict with international law obligations of the EU and/or its Member States, it is argued that it is warranted to functionally integrate and/or anticipate international legal constraints when determining the issue of mixity under EU law.⁷ The CJEU rather timidly but firmly seems to embrace such an approach in the *Marine protected areas (MPA)* (also known as ‘AMP Antarctique’’) case.⁸

After briefly recalling the key features of ‘partial’ and ‘imperfect’ conferral respectively,⁹ core issues of facultative and functional mixity will be identified in relation to ‘truly shared competence’ and put into a 5 fold analytical reference frame. The core issues underlying facultative mixity are identified in the following sequential order: (i) can (truly) shared competence lead to mixity; (ii) If so, is mixity then in principle facultative in nature; (iii) if so, can there be a functional conditionality to facultative mixity; (iv) if so, is functional conditionality

¹ The final version of this paper will be published in the book: M. Chamon, M. & I. Govaere, (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity*, Brill | Nijhoff, 2020 (forthcoming).

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³ See chapter 1 to this book by Rosas .

⁴ See also the other contributions to this book.

⁵ See inter alia Sacha Garben & Inge Govaere, ‘The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future’, in: Garben & Govaere (eds), *The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future*, Oxford, Hart Publishing, 2017, pp. 3-18.

⁶ See *infra* at section 2.

⁷ See *infra* at section 3.

⁸ Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:925, see *infra* at section 4.

⁹ See *infra* at section 2.

to be applied for legal and/or practical reasons; (v) if so, does it constitute a negative or positive functional mixity.¹⁰

On the basis of this analytical framework, a systematic reading will seek to identify the widely varying approach adopted in CJEU case-law and Advocates General Opinions since Opinion 2/15.¹¹ In so-doing, the focus will primarily lay on the apparent facultative mixity discussion internal to the CJEU rather than to engage in an exhaustive doctrinal analysis of mixity.¹²

The last section will identify a number of special cases which might warrant a combined reading of the principle of imperfect conferral and functional mixity considered in isolation, regardless of the exclusive or shared nature of the competence conferred to the EU. It is argued that in particular EU participation in other international organizations as well as prior¹³ and previous¹⁴ agreements concluded by the Member States call for due deference to the international legal context when settling issues of mixity in the EU.¹⁵

2. Key Features of Partial and Imperfect Conferral

As argued elsewhere, the principle of conferral is crucial from a threefold perspective: it determines the delimitation of competence between the Member States and the EU, triggers the application of the autonomous EU legal order with its special characteristics and procedures, and directly impacts on the relations between the EU and/or its Member States with third countries and other international organizations.¹⁶ The Lisbon Treaty in Articles 2-6 TFEU goes to some length to spell out the modalities and the consequences of the principle in terms of competence. Yet it falls short in addressing the follow-up question of what this then entails in terms of the form of action to be undertaken. In particular the need for mixity, or not, when dealing with third countries and international organizations is met with deafening silence.¹⁷ Should one then simply conclude that the issue of the (external) representation of the EU and/or its Member States is tantamount to the (internal) delimitation of competence? A

¹⁰ See *infra* at section 3.

¹¹ See *infra* at section 4.

¹² For doctrinal analysis, see the other contributions to this book.

¹³ Agreements concluded by Member States before accession to the EU.

¹⁴ Agreements lawfully concluded by Member States after accession to the EU (ie. compatible with the EU treaties and mainly before a shift towards exclusive EU competence has occurred).

¹⁵ See *infra* at section 5.

¹⁶ Inge Govaere, 'To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon', in: Cremona (ed.), *Structural Principles in EU external relations law*, Oxford, Hart Publishing 2018, pp. 71-91.

¹⁷ This was different under the Nice Treaty, which quite paradoxically expressly introduced mixity under the CCEP heading in the then Article 133 (6) TEU: "*An agreement may not be concluded by the Council if it includes provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which this Treaty rules out such harmonisation.*"

In this regard, by way of derogation from the first subparagraph of paragraph 5, agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States."

The only such reference in the Lisbon Treaty is to be found in the solidarity clause of Article 222 TFEU, which states that "*The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster.*"

A special case seems to be reserved for the EU accession agreement to the ECHR. Whereas Article 218 (8) TFEU expressly refers to the need for constitutional ratification by the Member States, which would seem to require a mixity, it only invokes the need for unanimity voting in the Council without pointing to the need for joint action. It reads: "*The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.*"

straightforward positive answer would forgo the importance of the two main characteristics of the EU principle of conferral, namely its inherently partial as well as imperfect nature.

The first characteristic, namely 'partial conferral', is clearly expressed in article 5 TEU,¹⁸ and relates specifically to the internal delimitation of competence between the EU and its Member States. Three separate albeit linked features underlie this concept. Firstly, the conferral of competence to the EU is never 'full' or 'complete' but to the contrary can only be 'partial' in that it is expressly limited to attain the objectives of the EU Treaties. Secondly, it is the Member States as 'Masters of the Treaties' that attribute competence to the EU through the Treaties. An important new feature introduced by the Lisbon Treaty is the understanding that the EU integration process is no longer necessarily irreversible so competences conferred to the EU may possibly in the future also be withdrawn by the Member States either collectively,¹⁹ or individually.²⁰ Thirdly, the Lisbon Treaty now unequivocally spells out that the residual competence, covering all the matters that are not conferred upon the EU by the Treaties, remains (exclusively) with the Member States.

The second characteristic, that of 'imperfect conferral', is not immediately apparent in Article 5 TEU, as it relates specifically to the external dimension of the transfer of competence to the EU by the Member States. The conferral of competence is an act under EU law so it is binding between and upon the Member States in an intra-EU context, not only as concerns their unilateral measures but also with respect to international agreements concluded among themselves.²¹ Importantly, the CJEU has clarified that the EU principle of conferral also extends to actions between Member States in an extra-EU context.²² However, the EU Treaties including the principle of conferral are of course not binding on third countries who, by definition, have not subscribed to the EU Treaties. Under international law the Member States therefore remain fully fledged sovereign states in their dealings with third states and other international organizations and may be held accountable as such, even if by virtue of EU law their scope of action may be limited. It is important to underline that states were and to some extent still are the primary subjects of international law, suffice it to point to the fact that membership of international organizations is often restricted to states only.²³ EU legal personality is thus fundamentally distinct from that of the Member States and in practice is not always and readily interchangeable for the latter.²⁴

The issue of 'facultative mixity' as commonly understood is inherently linked to the inward looking discussion on the partial nature of conferral, whereas 'functional mixity' relates more to the imperfect nature of conferral when considered in its broader international dimension. Most of the attention in the mixity debate so far has gone to the introspective view of facultative mixity in relation to the principle of partial conferral. It is difficult, however, to separate the two

¹⁸ Article 5 TEU (Lisbon) stipulates as follows:

"1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

¹⁹ The last paragraph of Declaration 18 'In relation to the delimitation of competences' reads as follows:

"[...] the representatives of the governments of the Member States, meeting in an Intergovernmental Conference, in accordance with the ordinary revision procedure provided for in Article 48(2) to (5) of the Treaty on European Union, may decide to amend the Treaties upon which the Union is founded, including either to increase or to reduce the competences conferred on the Union in the said Treaties."

²⁰ In which case they withdraw from the EU altogether; see Article 50 TEU and the current Brexit process.

²¹ See for example the bilateral investment treaties affected by the Court's *Achmea* ruling, Case C-284/16, *Achmea*, EU:C:2018:158.

²² Case C-459/03, *Commission v. Ireland*, EU:C:2006:345.

²³ See *infra* at section 5.

²⁴ Rare exceptions are where the principle of substitution applies such as for the former GATT, see Joined Cases 21 to 24/72, *International Fruit Company NV*, EU:C:1972:115.

characteristics of the principle of conferral in practice. The next part will therefore go in search of how the concepts of facultative and functional mixity may be interrelated and even intertwined,²⁵ before testing it to recent case law.²⁶ The last section will further stretch and challenge the debate on mixity to address the fact that the EU division of competence is in itself not binding on third countries and other international organizations. It goes in search of examples whereby the principle of imperfect conferral may warrant functional mixity, regardless of the shared or exclusive nature of EU competence.²⁷

3. Facultative and Functional Mixity for Truly Shared Competence: An Analytical Framework

The Lisbon Treaty has triggered a renewed search for a *modus vivendi* whereby the EU and its Member States constitute mutually supportive international actors in pursuance of common goals and objectives set in the Treaties.²⁸ Ideally a sound and workable co-existence on the international scene should thereby be fostered but, instead, the EU and the Member States are often sidetracked by inter-institutional bickering. Most symptomatic in this respect is the following observation made by Advocate General Kokott in the MPA case:

“Both sides put forward their respective arguments with astonishing passion.

*The Council and some of its interveners make the underlying allegation that the Commission wished to do everything possible to prevent international action by the Member States, while the Commission alleges that the Council is compulsively looking for legal bases that always permit participation by the Member States alongside the Union.”*²⁹

The recurrent legal disputes brought before the CJEU post-Lisbon raising the question of the existence, or not, of exclusive EU competence³⁰ are at the forefront of those inherent tensions. Yet as soon as the exclusivity argument (partly) fails to the benefit of shared competence, the attention shifts to focus on the issue of the potential mixed participation by the EU and its Member States.

This is clearly illustrated by Opinion 2/15³¹ which has triggered a renewed debate on the concept of mixity post-Lisbon. The Commission’s question to the CJEU under Article 218(11) TFEU was not phrased merely in terms of exclusive or shared competence. It pointedly asked: *“Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore?”*³² The Council clearly rejected the link thus made between the EU having a ‘requisite’ competence, short of exclusivity, for it to ‘sign and conclude alone’ the agreement. It was reported to emphasize at the hearing *“that whether the European Union or the Member States exercise external competence to conclude a particular international agreement in an area of shared competence is ‘a political choice.’*³³ Such a statement instigates a potentially heated debate on numerous subquestions, for instance: is the form of conclusion of an agreement, including mixity, purely a matter of political opportunity or rather subject to full or marginal judicial review? What are the modalities of mixity? Is it strictly linked to the principle of partial conferral? Or should due account be given also to the imperfect nature

²⁵ See *infra* at section 3.

²⁶ See *infra* at section 4.

²⁷ See *infra* at section 5.

²⁸ Article 3 TEU & 21 TEU.

²⁹ AG Kokott in Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:362, para. 75.

³⁰ Such as relating to the interpretation of the concept of CCP (Article 207 TFEU and Article 3(1) TFEU) or the ERTA codification in Article 3(2) TFEU; see also sections 2 and 3 in the Chapter by Chamón in this volume.

³¹ Opinion 2/15 re *the Singapore FTA*, EU:C:2017:376.

³² *Ibid.*, para. 1.

³³ Opinion of AG Sharpston in Opinion procedure 2/15 re *the Singapore FTA*, EU:C:2016:992, para. 74.

of conferral? And, importantly in view of the fact that both the proper legal basis³⁴ and procedural requirements of Article 218 TFEU³⁵ have been held to have ‘constitutional significance’, should such then not also extend to the issue of mixity?

As will be seen in the next part, so far the facultative mixity conundrum has not yet received a conclusive answer in the case law. Pursuant to Opinion 2/15 several Advocates General have tentatively proposed different solutions, mainly expressing multiple variations on a common theme but without much common vision. The CJEU for its part seems to have tried to hold off as long as possible but is recently, albeit still rather timidly, taking a stance in the matter. In order to analyze those different approaches in the case law post Opinion 2/15, the core issues of facultative mixity are deconstructed in the following 5-fold reference frame.

Firstly and importantly, is it at all accepted that a ‘truly shared’³⁶ competence may lead to mixity? Although this appears to be an easy question, it clashes with a strong opposite thesis that the EU can and should act on its own as soon as it has competence in the matter, regardless of the nature of that competence.³⁷ The crucial test would then consist in simply ticking the box of partial conferral of competence to the EU, upon which the other structural principles³⁸ of sincere cooperation and unity of representation³⁹ immediately kick in to bar any Member States co-action. As a consequence, mixity could in this counter-thesis only arise where the Member States retain exclusive competence for part of the agreement.

Secondly, if it is accepted that ‘truly shared’ competence may lead to mixity, is this then obligatory and automatically so, or is it merely optional and subject to political expediency? In other words is the concept of ‘facultative mixity’ rejected or accepted as a matter of principle?

Thirdly, if facultative mixity is accepted as a matter of principle, could there be determining factors or justifications that would nonetheless warrant functional mixity? In other words, is there a form of conditionality applying to the optional nature of mixity which may limit the discretion of the Council?

A related fourth question is then what the nature of such conditionality could or should be. Can functional mixity relate only to legal imperatives or also be conditioned by practical concerns? Are such imperatives to be EU-only or also international in focus?

Lastly, the question arises whether functional mixity is used positively or negatively. This will mainly depend on the answer given to the first two questions above. ‘Negative functional mixity’ is the result of a reasoning accepting facultative mixity as a matter of principle, yet conditioned by functional reasons that box in the degree of political discretion. ‘Positive functional mixity’ starts from the opposite view, rejecting the very idea of (facultative) mixity unless this is required by functional imperatives.

When applying this simple framework to the Advocates General’s opinions and case-law post-Opinion 2/15, a rather cacophonous picture emerges, as the next part illustrates.

³⁴ Opinion 2/00 re the *Cartagena Protocol*, EU:C:2001:664, para. 5.

³⁵ Case C-425/13, *Commission v. Council*, EU:C:2015:483, para 62. See also section 5.1 of the Chapter by Chamon in this volume.

³⁶ ‘Truly shared’ competence is used here to distinguish from ‘joint’ competence emanating from the existence of exclusive competence of the Member States for part of the agreement.

³⁷ See also Piet Eeckhout, *EU External Relations Law*, Oxford, OUP, 2011, p. 265.

³⁸ See Marise Cremona, “Structural principles and their role in EU external relations law”, in: Cremona (ed.), *Structural Principles in EU external relations law*, Oxford, Hart Publishing 2018, pp. 3-29.

³⁹ See also the contribution to this book by Christophe Hillion and Merijn Chamon.

4. Cacophony Versus Symphony in The Case Law on Facultative Mixity

The fact that the Treaties remain silent on the issue of facultative mixity⁴⁰ renders it more problematic to firmly underpin sound legal reasoning. This may perhaps help to explain why the question of ‘facultative mixity’ is largely left in limbo until today. When applying the above analytical reference framework to the case law since Opinion 2/15, it is apparent that the CJEU still is very much in search of the best possible approach under the current Treaties leading to wavering positions.⁴¹ Before analyzing this case law, attention will be given first to the various attempts made by different Advocates General to formulate a convincing response to the debate on facultative mixity.

4.1. Solutions proposed to facultative and functional mixity by Advocates General

Since Opinion 2/15, four Advocates General have proposed a vision to the CJEU on the issue of mixity. Each in a very distinct manner squarely tackles the issue of facultative mixity and possible modalities thereof. Advocates General Wahl and Szpunar start from the premise that mixity, which moreover is accepted to be facultative in nature, arises in case of truly shared competence. However, they proceed to offer different answers to the follow up questions in terms of negative functional mixity mentioned in the above analytical framework. Advocates General Sharpston and Kokott seem to start from the opposite premise that as a matter of principle shared competence does not entail mixity, unless there are justifications in terms of positive functional mixity.

In Opinion 2/15 Advocate General Sharpston refused to tackle the question of facultative mixity head-on.⁴² She argues with reference to Opinion 2/00 that contrary to competence, mixity is not an issue that may be addressed by the CJEU in an Advisory procedure under Article 218(11) TFEU. The latter procedure has as a sole purpose to forestall complications that may arise when an agreement lawfully contracted under international law would later on be found to be incompatible with EU law⁴³ which, according to her, could not include issues of mixity.

Such an approach squarely bounces back the question of whether or not issues of mixity should not be considered to have constitutional significance, in the same manner as the CJEU recognized issues of legal basis to have constitutional significance in Opinion 2/00. In the latter case, the underlying working assumption of the CJEU appears to have been that the conclusion of shared competence necessarily entails mixity. It was with express reference to this premise that the CJEU refused to clarify the mere ‘management’ aspects of mixity in its advisory Opinion.⁴⁴

⁴⁰ See *supra* at section 1.

⁴¹ See *infra* at section 4.2.

⁴² Opinion of AG Sharpston in Opinion procedure 2/15 re *the Singapore FTA*, EU:C:2016:992, paras 83-84: “Despite the fact that the request concerns only the allocation of competences between the European Union and the Member States, some written observations (especially those of the Council) suggest that there might also be an issue regarding the process through which the Commission negotiated the EUSFTA and now proposes to sign it. Whilst the negotiating directives provided for the negotiation of a mixed agreement, the Commission negotiated the EUSFTA as an agreement between the European Union and Singapore alone. Did the Commission thereby disregard Article 218(4) TFEU and the principle of mutual sincere cooperation laid down in Article 13(2) TEU? In my view, it is neither necessary nor appropriate, in the context of the present proceedings, to take a position on that issue. The process through which the EUSFTA was negotiated does not, as such, affect the allocation of competences between the European Union and its Member States for concluding it. It is therefore outside the scope of the Commission’s request. Nor (in principle) could a failure to respect rules as to process under EU law affect the validity of the agreement as a matter of international law. (34) I shall therefore not address that issue further.”

⁴³ Opinion 1/75 re *Local Cost Standard*, EU:C:1975:145; Opinion 2/00 re *the Cartagena Protocol*, EU:C:2001:664.

⁴⁴ Opinion 2/00 re *the Cartagena Protocol*, EU:C:2001:664, para. 13 provides: “The second question is asked on the basis that the Community is not recognised as having exclusive competence under Article 133 EC to conclude the Protocol in its entirety, but enters into commitments with the other Contracting Parties on the joint basis of Articles 133 EC and 174(4) EC. In that case, the Protocol would be concluded both by the Community, under its

Interestingly, however, in Opinion 2/15, Advocate General Sharpston seems to take the opposite view that from an EU law perspective mixity is not automatic nor compulsory in the face of shared competence but even altogether excluded.⁴⁵ Instead, according to her a finding of shared competence would lead to the following inherently political but merely two-fold choice to be made in the Council:

*“the Member States together (acting in their capacity as members of the Council) have the power to agree that the European Union shall act or to insist that they will continue to exercise individual external competence.”*⁴⁶

As a consequence, the only scenario in which mixity could still arise under the principle of partial conferral is where the political decision is taken in the Council for the Member States to exercise their individual competences for the areas of shared competence, whereas exclusive EU competence extends to other parts of the international agreement. In this respect the Advocate General does not see the need for positive functional mixity by virtue of international legal constraints.⁴⁷ However, she does point out that the scope of political discretion to opt between EU or Member States channels in case of shared competence is in itself subject to EU legal constraints: *“As I see it, the legal safeguards underpinning that political choice lie in the detailed procedures set out in Article 218 TFEU”*.⁴⁸ It is not clear, however, what the default position should be. Is there a need for a positive decision in line with the Article 218 TFEU voting rules in the Council in favour of EU action, or rather in favour of individual Member States action? What happens if the Council is split on the issue so that no qualified majority can be obtained either way? Interestingly enough, whilst offhand refusing to accept mixity as a possible fallback position to deal with shared competence under the EU Treaties, Advocate General Sharpston in Opinion 2/15 does identify reasons relating to imperfect conferral which might necessitate a mixed agreement, even in areas of exclusive EU competence. These will be addressed below.⁴⁹

Contrary to Advocate General Sharpston, Advocate General Wahl squarely endorses the concept of facultative mixity in Opinion 3/15 (Marrakech Treaty). In his view and as a matter of principle:

commercial policy and environmental protection powers, and by the Member States, under the powers which they retain in the latter field. The Commission accordingly seeks clarification regarding the effect which the extent of the respective powers of the Community and its Member States might have on management of the Protocol.” (emphasis added).

⁴⁵ See Opinion of AG Sharpston in Opinion procedure 2/15 re *the Singapore FTA*, EU:C:2016:992, paras 72-73: *“First, it is necessary to check that shared competence actually exists under Article 4 TFEU. Assuming that the answer to that question is ‘yes’, one then looks at Article 216(1) TFEU to see whether one of the grounds there listed giving the European Union competence to enter into an international agreement is satisfied. Since, on this hypothesis, there is no exclusive external competence under Article 3(2) TFEU, it is likely that it is the first, second and third grounds under that provision that will be relevant. The combination of Article 4 TFEU and Article 216(1) TFEU creates the conditions necessary for the existence of EU shared external competence. What, then, of its exercise?”*

Here, it is necessary to return to Article 2(2) TFEU and the European Union’s right of pre-emption. If the European Union does not choose to exercise that right, external competence — like internal competence — will remain with the Member States and it follows that they (and not the European Union) will be competent to negotiate, sign and conclude an international agreement whose subject matter falls within that area of shared competence. However, the text of Article 2(2) TFEU can be read as permitting the European Union to exercise its right of pre-emption in relation to both external and internal competence.”

⁴⁶ Opinion of AG Sharpston in Opinion procedure 2/15 re *the Singapore FTA*, EU:C:2016:992, para. 75 (original emphasis).

⁴⁷ *Ibid.*, para 76-77, where she addressed the issue of liability under such a mixed agreement, transparency warranting a declaration of competence, and potential implications of the withdrawal of a Member State.

⁴⁸ *Ibid.*, para. 74.

⁴⁹ See *infra* at section 5.

*“The choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence (or of parallel competence), is generally a matter for the discretion of the EU legislature.”*⁵⁰

In so-doing, he does not spell out what procedural rules should underlie such a decision of the EU legislature with respect to any given agreement, perhaps implicitly endorsing AG Sharpston’s earlier opinion that Article 218 TFEU always acts as a legal safeguard. Importantly, he also does not indicate what the default option would be in case no qualified majority could be obtained in the Council for either mixity or an EU-only agreement. Instead, Advocate General Wahl immediately proceeds to acknowledge the existence of possible limits to the facultative nature of mixity. He points out that as a corollary of the broad political margin of discretion left to the Council to decide on mixity in areas of shared competence, the CJEU can (only) exercise a very limited judicial review, namely to check whether such a decision “is *‘manifestly inappropriate’ having regard to the objective which the competent institution is seeking to pursue.*”⁵¹ He illustrates the latter by two concrete examples. The first is where the decision in favour of mixity might “because of the urgency of the situation and the time required for the 28 ratification procedures at national level, seriously risk compromising the objective pursued.”⁵² The second example is where mixity would “cause the Union to breach the principle *pacta sunt servanda.*”⁵³ He thus not only accepts overriding international legal constraints as an exception to the optional and political nature of mixity, but also important practical imperatives. In an open-ended list of possible functional exceptions to facultative mixity, and knowing the many operational problems that mixity may entail,⁵⁴ the category of ‘Negative Practical Functional Mixity’ seems however much more difficult to contain than that of ‘Negative Legal Functional Mixity’ and would merit a very precise circumscription.

In the subsequent *COTIF I* case, Advocate General Szpunar expressly endorsed the concept of facultative mixity as expressed by Advocate General Wahl in Opinion 3/15, repeating that “the choice between a mixed agreement or an EU-only agreement, when the subject matter of the agreement falls within an area of shared competence [...] is generally a matter for the discretion of the EU legislature.”⁵⁵ He clarifies that in his view this also necessarily extends to amendments to a mixed agreement.⁵⁶ The *COTIF I* case however merits special attention for two specific features which have largely been ignored, including by the CJEU.⁵⁷ First of all, in this case the question is completely reversed as compared to Opinion 3/15. It is a decision in the Council to proceed through solely EU channels in relation to truly shared competence, thus opting to reject mixity, which is contested (by a Member State), instead of vice versa (by the Commission). Secondly, this case relates to decision-making within another international organization, OTIF, where anyhow mixity in contracting the international legal obligations is not an option. According to the act of accession of the EU to OTIF alternate voting applies also in areas of shared competence so that either the European Union or its Member States have

⁵⁰ Opinion of AG Wahl in Opinion procedure 3/15 re *the Marrakesh Treaty*, EU:C:2016:657, para. 119.

⁵¹ In the words of the Advocate General: “That decision, as it is predominantly political in nature, may be subject to only limited judicial review. The Court has consistently held that the EU legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. It concluded from this that the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.” See Opinion of AG Wahl in Opinion procedure 3/15 re *the Marrakesh Treaty*, EU:C:2016:657, para. 120 (emphasis added).

⁵² *Ibid.*, para. 121.

⁵³ *Ibid.*

⁵⁴ Not least in terms of negotiation, ratification, implementation, interpretation, liability, etc.. See for instance Guillaume Van der Loo & Ramses A. Wessel, ‘The non-ratification of mixed agreements: Legal consequences and solutions’ (2017) 54 Common Market Law Review, Issue 3, pp. 735–770

⁵⁵ Opinion of AG Szpunar in Case C-600/14, *Germany v. Council*, EU:C:2017:296, para. 84.

⁵⁶ *Ibid.*, para. 86.

⁵⁷ See *infra* at section 4.2.

to cast the vote, regardless of the division of competence under EU law.⁵⁸ It will be submitted below that such cases should be tackled under the principle of imperfect conferral and (negative) functional mixity rather than treating it as an issue of facultative mixity.⁵⁹

The acceptance of facultative mixity as a matter of principle is again radically departed from by Advocate General Kokott in the subsequent MPA case.⁶⁰ She takes a totally opposite approach to the one previously proposed by Advocate General Wahl, starting from the premise that there is no facultative mixity under truly shared competence, unless a positive legal functional mixity or a positive practical functional mixity can be discerned. To determine the existence of a positive legal functional mixity, the Advocate General raises the question whether, under EU law, there is a 'legal necessity' for mixity. The test applied is essentially to determine the extent of the partial conferral of competence to the EU, regardless of the exclusive or shared nature of the EU competence. In her words:

*"There is a need for mixed action by the Union and its Member States on the international stage only where the Union itself does not have sufficient exclusive or shared competences to act alone in relation to third countries or in international bodies. Only if the Union does not have powers of its own is it absolutely necessary for the Member States to participate alongside the Union in international matters."*⁶¹

Positive legal functional mixity in this theory thus only arises when partial conferral has reached its limits. Such is held to be the case by Advocate General Kokott not only when Member States exclusive competence is engaged, but possibly also if the Member States were to represent territories outside the EU Treaties in relation to specific interest of the latter, for matters otherwise falling within EU shared or exclusive competence.⁶² Interestingly, AG Kokott puts this under the heading 'voluntary participation by individual Member States', most likely from the perspective that by virtue of EU law Member States would be allowed but not obliged to represent the interests of such territories.

When addressing the issue of the scope for voluntary participation of the Member States, Advocate General Kokott mostly addresses the issue of positive practical functional mixity. The key test applied hereby follows on from Article 2(2) TFEU which stipulates that "[t]he Member

⁵⁸ Opinion of AG Szpunar in Case C-600/14, *Germany v. Council*, EU:C:2017:296, para. 11 recalls Article 6 of the EU's accession agreement to the COTIF:

"1. For decisions in matters where the Union has exclusive competence, the Union shall exercise the voting rights of its Member States under the [COTIF].

2. For decisions in matters where the Union shares competence with its Member States, either the Union or its Member States shall vote.

3. Subject to Article 26, paragraph 7, of the [COTIF], the Union shall have a number of votes equal to that of its Member States who are also Parties to the [COTIF]. When the Union votes, its Member States shall not vote.

4. The Union shall, on a case-by-case basis, inform the other Parties to the [COTIF] of the cases where, with regard to the various items on the agendas of the General Assembly and the other deliberating bodies, it will exercise the voting rights provided for in paragraphs 1 to 3. That obligation shall also apply when decisions are taken by correspondence. That information is to be provided early enough to the OTIF Secretary-General in order to allow its circulation together with meeting documents or a decision to be taken by correspondence."

⁵⁹ See *infra* at section 5.

⁶⁰ Opinion of AG Kokott in Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:362.

⁶¹ *Ibid.*, para. 108.

⁶² In the AG's words: "it should be pointed out that individual Member States have territorial interests in the Antarctic outside the scope of the European Union's founding Treaties and Union policies. It cannot be ruled out that the Member States concerned will participate on their own behalf alongside the Union in discussions and decisions in the CCAMLR in order to safeguard such interests, provided the interests in question are specified. In the present case, however, there is no objective evidence amenable to review in this regard. In addition, the contested 2015 and 2016 decisions, which offered all Member States and not just individual Member States the possibility of participating in the CCAMLR alongside the Union, quite clearly go beyond what would be necessary to safeguard those territorial interests." Opinion of AG Kokott in Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:362, para. 123.

States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." There can therefore be no voluntary participation by the Member States in a post-Lisbon setting if the EU has exercised its competence fully.⁶³ In line with Advocate General Sharpston before, Advocate General Kokott acknowledges that it is a political decision of the Council whether or not to exercise the Union's competence. But she raises the bar higher, by requiring 'objective evidence amenable to review' that the Council did not wish to exercise the Union's existing competences fully.⁶⁴ Strikingly, the fact that the Council clearly opted for mixity is, according to her, no such objective proof of a political decision taken in the Council in favour of Member State action but is rather down to the fact that the "Council erroneously summarily equated shared competences and mixed action."⁶⁵

In spite of these sometimes fundamentally different views on how to tackle mixity, there is nonetheless one common feature to be discerned. The analysis performed by Advocate General Kokott, as well as that of the other Advocates General, is heavily centered on an analysis of the implications of the principle of partial conferral. Little or no attention is given to the issues of imperfect conferral relating to the very specific international context in which the question of mixity arose. After initially following the same path, it will be seen in the next section that the CJEU has gradually opened up its spectrum of analysis to (partly) include also the international legal imperatives.

4.2. The CJEU's wavering positions on facultative mixity

The CJEU response to the issue of facultative mixity has taken on a totally different dynamic from that of the Advocates General. In Opinion 2/15 the CJEU, contrary to Advocate General Sharpston, seems to equate shared competence with obligatory mixity, thus implicitly rejecting the theory of facultative mixity altogether and firmly taking legal control of the issue. This impression was at least partly rectified in the subsequent *COTIF I* case,⁶⁶ where the CJEU conveyed the message that it had not meant to take a firm stance in the discussion on facultative mixity in Opinion 2/15 but had merely responded to the facts at hand. Yet in the later *MPA* case,⁶⁷ the CJEU went to some lengths to point to functional mixity concerns to condition or even push aside the notion of facultative mixity altogether.⁶⁸ The question is whether and to what extent such difference in approach is and should be determined by the underlying facts of each case.

A first striking feature of Opinion 2/15 is that the CJEU first openly acknowledged that the question raised by the Commission queried about mixity,⁶⁹ only to fail to expressly address the issue of mixity in its conclusion.⁷⁰ The CJEU instead focused on delimitation of competence,

⁶³ *Ibid.*, paras 111-117.

⁶⁴ *Ibid.*, paras 114-115.

⁶⁵ *Ibid.*, para. 116.

⁶⁶ Case C-600/14, *Germany v. Council*, EU:C:2017:296, para. 68.

⁶⁷ Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:925.

⁶⁸ See *infra* at section 5.

⁶⁹ See Opinion 2/15 re the *Singapore FTA*, EU:C:2017:376, para. 29: "In the present instance, the request for an opinion relates to whether the envisaged agreement can be signed and concluded by the European Union alone or whether, on the contrary, it will have to be signed and concluded both by the European Union and by each of its Member States (a 'mixed' agreement)." (emphasis added).

⁷⁰ The final opinion is solely formulated in terms of division of competence, and reads:

"The Free Trade Agreement between the European Union and the Republic of Singapore falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States:

- the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to non-direct investment between the European Union and the Republic of Singapore;
- the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9; and

ruling that non-direct foreign investment and Investor-State-Dispute-Settlement (ISDS) fall within shared competence, whereas the bulk of the agreement was confirmed to be exclusive competence of the EU.⁷¹ As a consequence it fueled the discussion on the form under which such comprehensive new trade agreements need to be concluded. It seemingly left open the question of whether mixity is at all possible and, if so, obligatory or facultative in nature. When turning for guidance to the text of Opinion 2/15, the second striking feature is that, quite interestingly, the CJEU reasons differently on the link between shared competence and mixity according to the subject matter at stake.

On the one hand, for non-direct foreign investment the CJEU points to the fact that Article 216(1) TFEU allows for the conclusion of agreements which are 'necessary to achieve a Treaty objective' also if the latter is subject to shared competence, such as the internal market pursuant to Article 4(2)(a) TFEU. As such is the case for free movement of capital and payments between Member States and third States laid down in Article 63 TFE, the CJEU concludes in paragraph 244 of Opinion 2/15 that :

"It follows that Section A of Chapter 9 of the envisaged agreement cannot be approved by the European Union alone."

On the other hand, with respect to ISDS a similar conclusion of shared competence is based upon a quasi opposite logic. The CJEU explains the rationale for ISDS in paragraph 292-293 of Opinion 2/15 as follows:

"Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States' consent."

It follows that approval of Section B of Chapter 9 of the envisaged agreement falls not within the exclusive competence of the European Union, but within a competence shared between the European Union and the Member States."

In relation to non-direct foreign investments, the reasoning of the CJEU can be resumed in the sequence 'shared competence therefore mixed'. This is different for ISDS, where the CJEU seemingly adopts the opposite sequence of 'necessarily mixed therefore shared competence'. In both cases, however, the CJEU appears to clearly reject facultative mixity in favor of obligatory mixity when dealing with shared competence.

Such an approach is consonant with the position which the CJEU implicitly took also prior to the Lisbon Treaty, as illustrated by the above mentioned Opinion 2/00 on the Cartagena

– the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) of that agreement, in so far as those provisions relate to the provisions of Chapter 9 and to the extent that the latter fall within a competence shared between the European Union and the Member States."

⁷¹ In Opinion 2/15 the Court concludes:

The Free Trade Agreement between the European Union and the Republic of Singapore falls within the exclusive competence of the European Union, with the exception of the following provisions, which fall within a competence shared between the European Union and the Member States:

- the provisions of Section A (Investment Protection) of Chapter 9 (Investment) of that agreement, in so far as they relate to non-direct investment between the European Union and the Republic of Singapore;
- the provisions of Section B (Investor-State Dispute Settlement) of Chapter 9; and
- the provisions of Chapters 1 (Objectives and General Definitions), 14 (Transparency), 15 (Dispute Settlement between the Parties), 16 (Mediation Mechanism) and 17 (Institutional, General and Final Provisions) of that agreement, in so far as those provisions relate to the provisions of Chapter 9 and to the extent that the latter fall within a competence shared between the European Union and the Member States.

Protocol.⁷² It is also in line with the early *ERTA* case where the CJEU held that a decision on whether or not to act externally is purely a matter of political expediency. But this is also where the political discretion ends. The CJEU firmly held that the follow up question of whether to proceed through the EU or the Member States is amenable to judicial review.⁷³ It would be logical to assume that such a judicial review then also extends to a decision on whether or not to proceed on the basis of both the EU and its Member States together, rather than one or the other, and thus squarely tackles the issue of mixity.

In the following *COTIF I* case, where Advocate General Wahl had given a favourable opinion on the matter of facultative mixity,⁷⁴ the CJEU nonetheless was quick to dispel the impression that in Opinion 2/15 it firmly rejected once and for all the very concept of facultative mixity. In paragraph 68 of the *COTIF I* Judgment, the CJEU offers the following clarification on the importance of Opinion 2/15 for the facultative mixity conundrum:

“Admittedly, the Court found, in paragraph 244 of that Opinion, that the relevant provisions of the agreement concerned, relating to non-direct foreign investment, which fall within the shared competence of the European Union and its Member States, could not be approved by the Union alone. However, in making that finding, the Court did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area”.

This single paragraph is highly interesting for at least four reasons. Firstly, the CJEU thus seems to imply that in case of shared competence, mixity is the default position, which can (only) be set aside by a political decision in the Council in conformity with the procedural requirements of Article 218 TFEU. Secondly, the CJEU does not at all mention the possibility for the Council to obtain a required majority so as to set aside mixity in favour of allowing action through the individual Member States instead of the EU. Not only does this depart from the two-fold political option to proceed through the EU or the Member States as proposed by both Advocate Generals Sharpston and Kokott. It is highly problematic in particular in view of the very facts of the *COTIF I* case. As already mentioned above, mixity is simply not a viable option for OTIF because in the context of that international organization the system of alternate voting necessarily applies.⁷⁵ Thirdly, it leaves open the question as to the possible, if any, role of the European Parliament in deciding the (mixed) form of the external action to be undertaken. This is a viable question, in particular having regard to the increased role of the European Parliament in EU external relation under the Lisbon Treaty other than CFSP⁷⁶ or the position to be adopted in in a body set up by an agreement.⁷⁷ Last but not least, it is clear that this express clarification relates merely to the reasoning developed by the CJEU in relation to specifically non-direct foreign investments, as it only refers to paragraph 244 of Opinion 2/15. In so-doing, it remains conspicuously silent and therefore seems to leave intact the different rationale expressed in paragraphs 292-293 for concluding to obligatory mixity in relation to ISDS-type of situations.⁷⁸

⁷² See *supra* at section 4.1.

⁷³ Case 22/70, *Commission v. Council*, EU:C:1971:32, para. 70.

⁷⁴ See *supra* at section 4.1.

⁷⁵ See *supra* at section 4.1.

⁷⁶ Article 218(6) TFEU.

⁷⁷ Article 218(9) TFEU, which was at issue in the *COTIF* case.

⁷⁸ This conclusion may be supported by the distinction made by the CJEU between ISDS and commercial arbitration proceedings in the *Achmea* case. The CJEU pointed out that “While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law (see, to that effect, judgment of 27 February 2018,

Similarly as the Advocates General, both in Opinion 2/15 and *COTIF I* the issue of mixity, or not, is dealt with by the CJEU mainly in the light of the EU principle of partial conferral and supervening legal functional imperatives under EU law. Yet the CJEU radically departs from the Advocate General in the subsequent MPA judgment⁷⁹ and marks an important turning point by duly taking into account the international context in which the issue of mixity arises. The CJEU first recalls that “*when the European Union decides to exercise its powers they must be exercised in observance of international law.*”⁸⁰ The main novelty lies in that the CJEU then continues to apply this to the determine the issue of mixity:

*“In the specific context of the system of Antarctic agreements, exercise by the European Union of the external competence at issue in the present cases that excludes the Member States would be incompatible with international law.”*⁸¹

As such, the CJEU allows for concerns relating to imperfect conferral, rather than solely partial conferral, to determine the form of external action to be taken by the EU and its Member States. In the next section it will be considered whether in so-doing it introduced a positive legal functional mixity meant to condition facultative mixity, or rather opened the door to an assessment in its own right regardless of the nature of EU competence.

5. Imperfect Conferral Leading to Positive or Negative Functional Legal Mixity Regardless of the Nature of the Competence?

Considering the facts underlying the MPA case, It is not surprising that the CJEU explains the need for superseding legal functional mixity in relation to shared competence. At paragraph 133, the CJEU states:

“In those circumstances, to permit the European Union to have recourse, within the CCAMLR, to the power which it has to act without the participation of its Member States in an area of shared competence, when, unlike it, some of them have the status of Antarctic Treaty consultative parties, might well, given the particular position held by the Canberra Convention within the system of Antarctic agreements, undermine the responsibilities and rights of those consultative parties — which could weaken the coherence of that system of agreements and, ultimately, run counter to Article V(1) and (2) of the Canberra Convention.”

The logic and rational used by the CJEU points to the necessity to smoothly interconnect EU law with international law by not needlessly interpreting the former in a manner which would disrupt the latter.⁸² If that is so intended, then the question arises whether it is feasible to limit the impact of imperfect conferral to the sole area of truly shared competence, only to mitigate facultative mixity. Could the imperfect nature of conferral not lead to compulsory negative or positive functional mixity regardless of the nature of the competence involved and, be it exceptionally, extend also to areas of exclusive EU competence? There seem to be at least two specific settings that would warrant such a conclusion The first relates to the functioning

Associação Sindical dos Juizes Portugueses, C-64/16, EU:C:2018:117, paragraph 34), disputes which may concern the application or interpretation of EU law”, Case C-284/16, *Achmea*, EU:C:2018:158, at para 55. As mentioned above, also in paragraph 292 of Opinion 2/15, the CJEU underpinned the need for mixity by the fact that ISDS would remove jurisdiction from the national courts and not just from the CJEU, pointing out that: “*Such a regime, which removes disputes from the jurisdiction of the courts of the Member States, (...) cannot, therefore, be established without the Member States’ consent.*”

⁷⁹ Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:925.

⁸⁰ *Ibid.*, para. 127.

⁸¹ *Ibid.*, para. 128.

⁸² For an analyses of the CJEU approach to international law so as to avoid a clash between the two legal orders, see Inge Govaere, “Interconnecting Legal Systems and the Autonomous EU Legal Order: a Balloon Dynamic”, in: Govaere & Garben, (eds), *The Interface Between EU and International Law: Contemporary Reflections*, Hart Publishing, 2019, pp. 19-43.

of the EU and its Member States in other international organizations. The second takes into consideration prior and previous agreements concluded by the Member States. Because of the fundamental differences between the two scenarios, both will be further elaborated upon in turn.

5.1. Participation in other international organizations

It cannot go unnoticed that the CJEU in the above mentioned paragraph 133 of the MPA judgment distinguishes between two different reference frames. On the one hand, it points to the inward looking appraisal under EU law in terms of partial conferral and the possible manner to exercise the competence thus conferred. On the other hand, due consideration is also given to the possible exercise of such imperfectly conferred competence from the perspective of international law. The finding, not surprisingly, is that the two do not necessarily match.

Whenever competence is to be exercised in the framework of another international organization, the rules set by that other international organization may functionally determine the form in which EU competence can or should be exercised within its forum. An important given thereby is that states are the primary members of most international organizations, although participation by regional organizations and in particular the EU may be gradually facilitated. At least the following three types of situations may be discerned.

First of all, certain international organizations, such as the International Labor Organization (ILO), only accept states as members and thus simply foreclose membership to other international organizations. Already in the ILO opinion the CJEU therefore clearly distinguished between on the one hand issues of partial conferral, or internal division of competence to adopt the decisions, and on the other hand the implications of imperfect conferral, or the form to be adopted to exercise that competence internationally. It ruled that by virtue of functional international law constraints:

*“although, under the ILO Constitution, the Community cannot itself conclude Convention No 170, its external competence may, if necessary, be exercised through the medium of the Member States acting jointly in the Community's interest.”*⁸³

Interestingly for the discussion at hand, the CJEU ruled that internally the ILO convention fell within the joint competence of the EU and the Member States, covered partly by EU exclusive competence and partly shared competence. It nonetheless accepted that the Member States alone would internationally contract obligations in their own name, as a medium for the EU, even in the areas of exclusive EU competence. This indicates clearly that the form of the external action to be taken in order to align to international legal constraints may even be diametrically opposed to the internal EU legal competence assessment. Whenever the EU is not itself a member of another international organization, the international reality simply is that regardless of exclusive or shared EU competence, only the Member States will be able to act externally.

Secondly, the fact that some international organizations have opened up membership to regional organizations, not least to accommodate the EU, does not necessarily grant the EU a fully autonomous status within that organization distinct from its Member States. Often membership by the EU will be made subject to alternate voting rights with its Member States, such as in the FAO⁸⁴ and OTIF. This then implies that also in areas of shared competence mixity is functionally excluded by virtue of the international setting in which the EU operates. As such, it was already mentioned above that for this very reason both the CJEU and Advocate

⁸³ Opinion 2/91 re *ILO Convention No 170*, EU:C:1993:106, para. 5.

⁸⁴ See Case C-25/94, *Commission v. Council*, EU:C:1996:114.

General Szpunar wrongly turned to the issue of facultative mixity in the context of the COTIF case.

Thirdly, within the framework of an international organization the participation of another organization, such as the EU, may be made dependent and subordinate to the membership of its Member States. According to the CJEU that was precisely the situation in the MPA case:

“It is clear from reading Article VII(2)(c) of the Canberra Convention in conjunction with Article XXIX(2) thereof that a regional economic integration organisation, such as the European Union, can accede to that convention and become a member of the CCAMLR only if its Member States are members. On the other hand, no analogous condition is laid down tying the presence of those States within the CCAMLR to the fact that the regional organisation concerned is also a member of that commission.

Consequently, the Canberra Convention does not grant regional integration organisations, such as the European Union, a fully autonomous status within the CCAMLR.

(...)⁸⁵

*The European Union is one of the Contracting Parties to the Canberra Convention to which the provisions of Article V(1) and (2) of that convention are addressed, since it is not a party to the Antarctic Treaty. It follows, in particular, that it is required to acknowledge the special obligations and responsibilities of the Antarctic Treaty consultative parties, including of those of its Member States which have that status, whether or not they are members of the CCAMLR.”*⁸⁶

This specific international legal context led the CJEU to conclude to a positive functional mixity specifically in relation to an area of shared competence. In line with the above ILO opinion reasoning it is submitted, however, that the nature of the external EU competence, whether shared or exclusive, does not really matter if one accepts that it is anyhow the international legal context which dictates the mixed form, or not, of the legal action to be taken.

5.2. Prior and previous Member States agreements

Functional mixity may also be warranted from the perspective of imperfect conferral whenever the EU concludes international agreements outside the forum of other international organizations. This is the case in particular where one or more Member States had already concluded conflicting international agreements which now need to be terminated. As early as Opinion 1/76 the CJEU had expressly acknowledged the necessity of positive functional legal mixity specifically for the sole purpose of terminating prior Treaty obligations of Member States under Article 351(2) TFEU.⁸⁷ The latter Treaty provision specifically relates to conflicting treaty obligations contracted by Member States prior to setting up or acceding to the EU. In Opinion

⁸⁵ “That is all the more the case given that the set of treaties and international agreements applicable to the Antarctic forms an organised and coherent system, headed by the oldest and most general treaty among them, namely the Antarctic Treaty, a fact which is reflected by Article V of the Canberra Convention. It follows from Article V that even the parties to the Canberra Convention which are not parties to the Antarctic Treaty acknowledge the special obligations and responsibilities of the Antarctic Treaty consultative parties and, consequently, observe the various measures recommended by them. Therefore, the Antarctic Treaty consultative parties have primary responsibility for developing the aforesaid set of Antarctic agreements and for safeguarding its coherence” (para 131).

⁸⁶ Joined Cases C-626/15 and C-659/16, *Commission v. Council*, EU:C:2018:925, paras 129-132.

⁸⁷ Opinion 1/76 *re European laying-up fund for inland waterway vessels*, EU:C:1977:63, para 6 and in particular also para 7 where the CJEU unequivocally spelled out: “The participation of these States in the Agreement must be considered as being solely for this purpose and not as necessary for the attainment of other features of the system.”

2/15, Advocate General Sharpston takes this reasoning a step further.⁸⁸ She convincingly argues that a positive functional mixity may be necessary under international law to terminate conflicting previous agreements concluded by Member States, regardless if they pre- or post-date the Member State's accession to the EU. The backdrop is of course the numerous Bilateral Investment Treaties (BITs) already concluded between Member States and third countries before the Lisbon Treaty enlarged the scope of exclusive EU competence to include foreign direct investments.⁸⁹ She spells out the following international legal constraints:

*“Thus, even if the Treaties transfer competence over a particular area entirely to the European Union, the Member States must continue to perform their obligations under international agreements with third States. That is consistent with the well-established principle under international law that internal law cannot justify failure to perform an international agreement or affect the validity of that agreement. That also means that changes to the Treaties cannot result in the European Union substituting itself for the Member States in agreements which they have previously concluded with third States. Thus, a third State continues to be bound by an agreement with the Member State concerned and in principle full performance of that agreement is, in accordance with the principle of pacta sunt servanda, due from both parties to the agreement.”*⁹⁰

The CJEU nonetheless plainly rejects this international law argument in Opinion 2/15 in the following succinct terms:

“The fact that the European Union and the Republic of Singapore have inserted in the envisaged agreement a provision making expressly clear that bilateral investment agreements between Member States and that third State are terminated and accordingly no longer give rise to rights and obligations upon the entry into force of the agreement concluded with that third State at EU level cannot be regarded as encroaching upon a competence of the Member States, in so far as that provision relates to a field in respect of which the European Union has exclusive competence.

*When the European Union negotiates and concludes with a third State an agreement relating to a field in respect of which it has acquired exclusive competence, it takes the place of its Member States. It has been undisputed since the judgment of 12 December 1972, International Fruit Company and Others (21/72 to 24/72, EU:C:1972:115, paragraphs 10 to 18), that the European Union can succeed the Member States in their international commitments when the Member States have transferred to it, by one of its founding Treaties, their competences relating to those commitments and it exercises those competences.”*⁹¹

At least three troubling issues emerge from this statement by the CJEU. First and foremost, contrary the clear analysis of Advocate General Sharpston, the CJEU in Opinion 2/15 seems to totally disregard the principle of imperfect conferral. The partial conferral of competence to the EU of course does not suffice to equate and interchange EU legal personality to that of the Member States under international law. Secondly, the CJEU heavily insists on the argument of superseding exclusive competence of the EU. Equating exclusive competence with a quasi-automatic application of the principle of substitution seems to be quite a stretch and disregards the other conditions thereto prevailing in the *International Fruit Company* case.⁹² Moreover, the issue of positive functional legal mixity for the sake of terminating prior treaty obligations

⁸⁸ Opinion of AG Sharpston in Opinion procedure 2/15 re *the Singapore FTA*, EU:C:2016:992, para. 389. However, at para. 377 she introduced this as ‘a novel question’ and failed to refer to Opinion 1/76.

⁸⁹ See Article 207 TFEU.

⁹⁰ Opinion of AG Sharpston in Opinion procedure 2/15 re *the Singapore FTA*, EU:C:2016:992, para. 381.

⁹¹ Opinion 2/15 re *the Singapore FTA*, EU:C:2017:376, paras 247-248.

⁹² Other factors taken into account were inter alia the fact that the GATT predated the EEC Treaty and was expressly referred to in the latter, see Joined Cases 21 to 24/72, *International Fruit Company*, EU:C:1972:115, para 10-18.

of Member States may equally arise in areas of shared competence where the doctrine of substitution anyhow cannot apply. As seen above, also the Singapore Agreement at issue was held to come under shared competence specifically in relation to non-direct foreign investments and ISDS. Perhaps the lightness of the legal reasoning employed by the CJEU in this case, in contrast to the later MPA case, may be partially explained by the fact that it had anyhow already concluded that the EU could not conclude the agreement alone. But a more consistent and international law sound reasoning employed by the CJEU would be much welcomed.

6. By Way of Conclusion

The discussion on facultative and functional mixity has been reinvigorated but is clearly not yet settled by recent case law. The Lisbon Treaty induced renewed questioning on issues of delimitation of competence, squarely putting the extent of partial conferral central in most cases. Little or no thought has thereby gone to the form in which the competence so conferred also needs to be expressed internationally. Nor has the potential impact of the inherently imperfect nature of conferral on the form to be taken by international action been systematically explored before the CJEU.

It is submitted that a link necessarily needs to be made between functional and facultative mixity. In particular when dealing with third countries and other international organizations, it no longer suffices to perform an analysis purely from an EU law perspective. Instead, a more balanced approach is urgently needed taking into account additionally at least the following four factors: the international (legal) context; the dependence of the EU on its Member States' presence on the international scene; the (special) responsibilities of (certain) Member States internationally; as well as the coherence of the international framework in which the EU operates. These issues become all the more pressing as the autonomous EU legal order not only interacts but also impinges more and more on the international legal order in which it operates. A conceptual five step framework is proposed in this contribution to come to terms with the double nature of conferral, partial and imperfect, as duly reflected in the combined reading of facultative and functional mixity. It is also indicated that exceptionally the question of functional mixity may arise in cases of exclusive EU competence.

The CJEU has not altogether shied away from mixity issues. The above analysis of recent case-law shows that the issue of facultative, obligatory or functional mixity may fall within the scope of judicial review at least from a three-fold perspective. Firstly by assessing the existence of superseding legal functional mixity from an intra-EU perspective, suffice it to think of ISDS and possibly similar types of cases where Member States necessarily have to be present also (Opinion 2/15). Secondly, in order to ensure respect for EU procedural provisions as laid down in Article 218 TFEU, although many open questions remain *inter alia* as to the default position and the possible role of the European Parliament (*COTIF I*). Thirdly, and importantly, to take into account the principle of imperfect conferral and the international legal context in which the EU and its Member States operate (*MPA*), although so far this has not been consistently pursued by the CJEU. Whether and to what extent the CJEU would also favourably consider superseding practical functional mixity as proposed by Advocate General Wahl,⁹³ remains a big question mark. Although recent case law thus shows tentative signs of overture, what is striking is the apparent absence of a conceptual framework to tackle this crucial issue within the CJEU. Four Advocates General have proposed four different and sometimes conflicting approaches, neither of which is currently systematically endorsed by the CJEU. It remains to be seen whether the CJEU will in the future take a better underpinned

⁹³ See *supra* at section 4.1.

stance on the matter and gradually set out a consistent EU law approach on mixity which proves to be workable also internationally.



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